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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 659

BERNARD G. BRENNAN COMPANY,
AN ILLINOIS CORPORATION,
Petitioner,

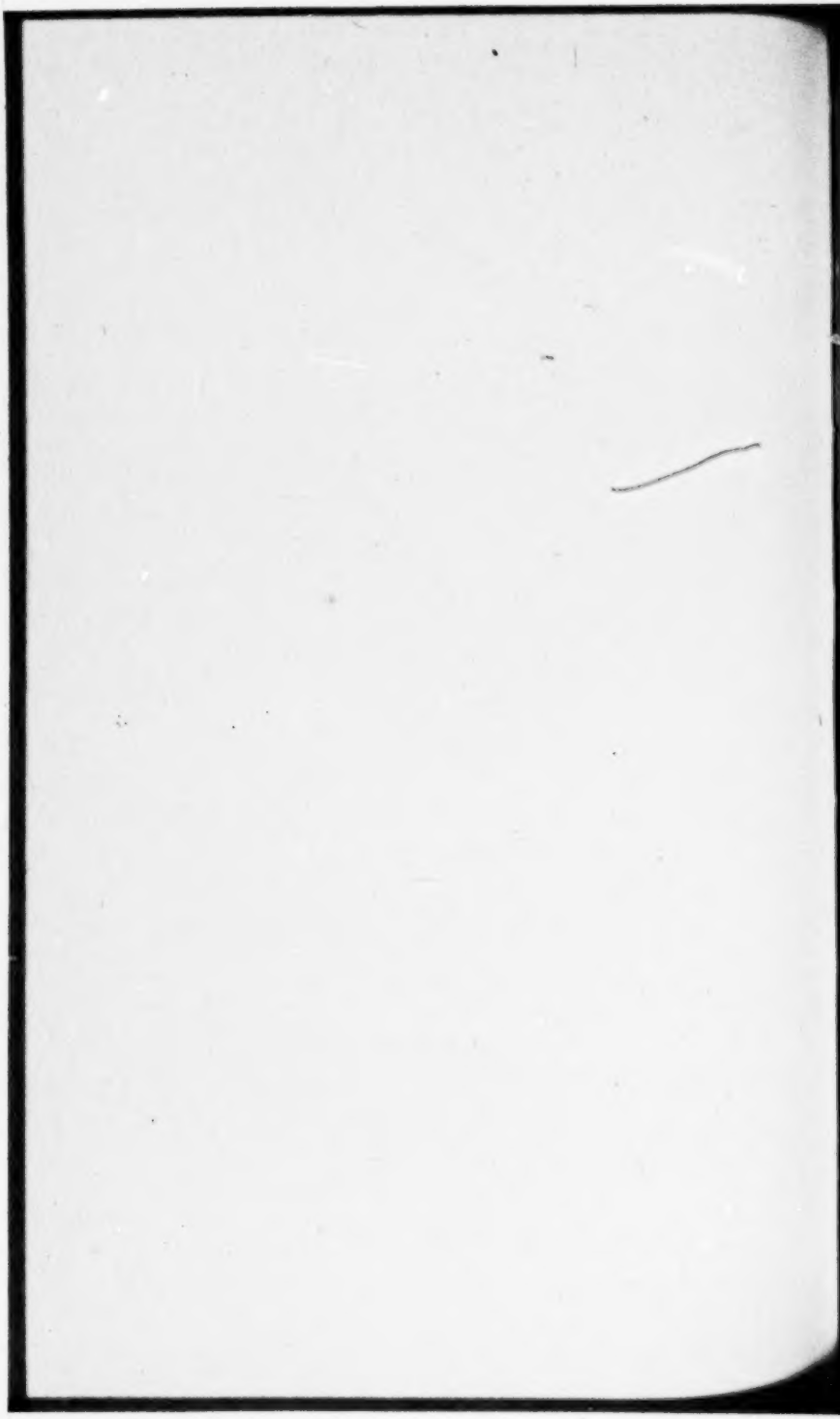
vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

WILLIAM R. BROWN,
CHARLES J. CALDERINI,
W. ROBERT BROWN,
Attorneys for Petitioner.

THE DONNELLEY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO



INDEX.

CITATIONS.

STATUTES.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court:

The petitioner, Bernard G. Brennan Company, an Illinois corporation, by its attorneys, William R. Brown, Charles J. Calderini and W. Robert Brown, respectfully prays that a writ of certiorari may issue to review the decision of the Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 18, 1947, which affirmed the judgment of the District Court for the Northern District of Illinois.

STATEMENT OF THE MATTER INVOLVED.

The petitioner brought this action for the recovery of $77,232.06 in floor stock taxes paid under the Agricultural Adjustment Act (7 U. S. C. A. 616) upon hog products possessed and held for sale by the petitioner on November 5, 1933. The trial court held that the claim for refund does not comply with the provisions of Section 903 of the Revenue Act of 1936 (7 U. S. C. A. 645) because it contains no evidence from which it can be determined whether or not the plaintiff shifted the economic burden of the tax. (R. 53.)

The petitioner's original claim for refund showed that the taxed articles were sold at market prices which, having declined after the imposition of the tax, did not permit recoupment of the tax through an increase in the selling prices. (R. 80, 81; C. C. A. Op. p. 6.) Thereafter petitioner filed an amended claim showing that its sales prices prior to the imposition of the tax were $5.63756 per unit and that following the imposition of the tax this sales value decreased to $4.75967 per unit. (R. 80; C. C. A. Op. p. 5.)

The parties stipulated that petitioner paid a total floor tax of $82,135.28, that defendant had previously refunded $2,194.96, and that petitioner had shifted the burden of the tax to the extent of a further $3,565.60 recovered from its vendees. (R. 21.) Under Rule 36 of Rules of Civil Procedure (28 U. S. C. A. following 723(c)), the government admitted that the respondent's agents examined petitioner's books, records and sales invoices covering the many thousands of individual sales of the articles upon which the floor taxes were paid. The taxed inventory consisted of 55 different articles weighing 12,076,995 pounds. These examining agents traced out the sales of each of the taxed

articles and made a summary showing the pre-tax value of the taxed articles to have been $910,421.28 and that petitioner recovered $866,226.84 from the ultimate sales of such articles, such sales being made over a period extending from November 5, 1933 to April 14, 1934. (R. 11-18.)

During the period from October 1, 1931 to April 14, 1934, petitioner was engaged in the business of slaughtering hogs and selling the hog products at wholesale with its principal place of business at 3916 South Normal Avenue, Chicago, Illinois. On April 15, 1934, the petitioner discontinued business and proceeded to liquidate its assets and has not since engaged in any business. (R. 19.)

The respondent produced as a witness one Murray T. Morgan, an accountant employed by the Department of Agriculture during the period in question. He testified as an expert and gave his opinion as to market prices of hog products and as to the effect of the tax on market prices. He relied upon certain publications to refresh his recollection (R. 27-35) and, having no familiarity with the specific facts of the instant taxpayer's operations, necessarily confined his opinions to general observations. Upon the trial petitioner objected to this evidence and urged these objections again in the Circuit Court of Appeals.

Upon the trial the defendant also introduced as exhibits the publications upon which its employee-witness relied to refresh his recollections. These publications contained market quotations on prices of only 30 of the 55 taxed articles and these 30 articles composed only 40% by weight of the 12,076,995 pounds upon which petitioner paid floor taxes. No evidence was offered as to the market prices of the other 60% of petitioner's taxed articles and, as to the 40% covered by such market statistics, no effort was made to provide any tangible reference or comparison to the prices which petitioner actually received. (R. 78; C. C. A. Op. p. 3.)

The district court (Hon. Walter J. LaBuy presiding) determined that on December 16, 1939, the petitioner filed an amended claim for refund with the Commissioner of Internal Revenue for the refund of $77,232.06 in which, as evidence that petitioner had not shifted the burden of the tax it sought to have refunded, a comparison was made of the petitioner's prices prevailing at the time of the incidence of the tax and those prevailing during the period in which the inventory upon which the tax was assessed and sold. (R. 52.) The trial court further held that the claim for refund does not comply with the provisions of section 903 of the Revenue Act of 1936 because it contains no evidence from which it can be determined whether or not the plaintiff shifted the economic burden of the tax.

The district court overruled petitioner's objections to the introduction of opinion evidence regarding the general effect of the tax here involved on the market price of pork products (R. 60), and overruled plaintiff's objections to defendant's exhibits which provided market price estimates covering only some 40% of the total weight of hog products on which petitioner was taxed. (R. 60.) Although admitting into evidence (R. 60) the specific facts admitted by the defendant with respect to the actual pre-tax sales values and post-tax actual sales recovery by the petitioner on the taxed articles, the trial court refused to incorporate such admitted facts as a part of the findings of fact but instead denied petitioner's motion to amend such findings in order to conform with the actual evidence before the trial court. (R. 50-60.) Judgment was entered for the defendant. (R. 60.)

In affirming this judgment, the Circuit Court of Appeals in an opinion by Evans, J., held that the third schedule of petitioner's amended claim shows "sales value of the taxed inventory at time of sale" and quotes the claim as follows:

"The foregoing schedules show that the taxed floor stocks at the time of production in the three months prior to the tax had a value of $5.63756 per unit and that during the three months following the imposition of the tax this sales value per 100 pounds live weight unit decreased to $4.75967 per unit.

This decrease in sales value * * * following the imposition of the tax is supported by the similar tables and data contained in Edinger's Report, which tables have been included in the original claim for refund filed by claimant, and the claimant bore the burden of the floor tax in the full amount * * *." (R. 80; C. C. A. Op. p. 5.)

The original claim stated:

"The market price of hog products declined in the period of sale of the floor stocks. The following market values per 100 pounds live weight are taken from bulletin issued by the U. S. Department of Agriculture * * * (then follows a chart showing prices for various categories of products for October, November, December of 1933, and January of 1944 and showing a decline in such prices)." (R. 80, 81; C. C. A. Op. p. 6.)

The Circuit Court held:

"A point was reached so low that, notwithstanding the inclusion of the tax element in the sales price, that price was still below the price at which the products were taxed in November, 1933. But does that prove that taxpayer did not add the tax and pass it on to the consumer? We think not." (R. 80; C. C. A. Op. p. 5.)

Notwithstanding defendant's admission that the pre-tax value of the taxed articles was $910,421.28 and that petitioner recovered only $866,226.84 on the sale thereof, the Circuit Court held: (a) that evidence of market value as to only 30 of the 55 taxed articles composing only 40% of the taxed weight was admissible to show that petitioner shifted the burden of the tax to its vendees; and (b) that the opinion of witness Morgan as to the effect of the imposi-

tion of the tax on the market price of the taxed articles was admissible to show that petitioner shifted the burden of the floor stock tax to its vendees. (R. 78; C. C. A. Op. p. 3.)

The Circuit Court further held:

> "The Statute specifically defines margins. (Sec. 649 (B) (1).) * * * The margin * * * shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity * * * and deduct the processing tax paid with respect thereto * * *." (R. 81; C. C. A. Op. p. 6.)

And then went on to hold:

> "We think the Congress advisedly chose to use "margins" (which we presume approximates the ordinary concept of 'profit') rather than the easily ascertained 'market' value, or sale value, which taxpayer sought to prove." (R. 81; C. C. A. Op. p. 6.)

The Circuit Court also held:

> "* * * the burden of the presentation of a proper claim, and of evidence sufficient to sustain it, is a well-nigh insuperable one. This may be a harsh burden, but we are governed by it." (R. 80; C. C. A. Op. p. 5.)

BASIS OF JURISDICTION.

On December 18, 1947, the United States Circuit Court of Appeals for the Seventh Circuit filed its opinion affirming the judgment of the United States District Court. (R. 76.) This petition for writ of certiorari is presented within three months of December 18, 1947, having been filed March 8, 1948.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. C. A. Sec. 347 (a).

QUESTIONS PRESENTED.

1. Whether proof that petitioner, after paying the floor stock taxes imposed on articles derived from the slaughter of hogs, sold the taxed articles at market prices less than their market price prior to the imposition of the tax establishes that petitioner bore the burden of the tax as required by Sec. 902 of the Revenue Act of 1936 (7 U. S. C. A. 644)?

2. Whether evidence as to the market price on only 30 of the 55 taxed articles and as to only 40% of the taxed inventory of 12,076,995 pounds of pork products can overcome defendant's admission that the taxed articles had a pre-tax value of $910,421.28 and were sold by petitioner after the payment of the tax for $866,226.84?

3. Whether the opinion of a witness as to the effect of the imposition of the tax on the market price of the taxed articles can overcome defendant's admission that the taxed articles had a pre-tax value of $910,421.28 and were sold by petitioner after payment of the tax for $866,226.84?

4. Whether a claimant for the refund of floor stock taxes paid under Sec. 16 of the Agricultural Adjustment Act (7 U. S. C. A. 616) is required to prove the margins as computed under Sec. 907 (b) (1) of the Revenue Act of 1936 (7 U. S. C. A. 649 (b) (1)) in order to recover?

5. Whether Sections 902 and 903 of the Revenue Act of 1936 (7 U. S. C. A. 644, 645) can be construed to place an insuperable burden on petitioner of proving all the economic factors that affected the market price of the taxed articles after the imposition of the tax?

REASONS FOR GRANTING CERTIORARI.

The discretionary power of this Court to grant a writ of certiorari herein is invoked on the following grounds:

1. The decision of the Circuit Court of Appeals for the Seventh Circuit in the instant case is in conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit in the following cases:

United States v. *Cheek*, 126 F. 2d 1, 3.

United States v. *Root McBride Co.*, 136 F. 2d 907.

In conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the following case:

Interwoven Stocking Co. v. *United States*, 144 F. 2d 768, 771.

In conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the following case:

United States v. *Arkwright Mills*, 139 F. 2d 454.

And even in conflict with its own earlier decision in the following case:

C. B. Cones Mfg. Co. v. *United States*, 123 F. 2d 530.

In *United States* v. *Cheek*, 126 F. 2d 1, the Sixth Circuit found that the taxed sugar had been sold by the claimant at a price lower than its cost to him, that he had paid insurance and storage charges of over $2,000.00, and that the sugar was sold on a highly competitive market where the factors and elements affecting the price were many and varied, and impossible to determine. The Sixth Circuit accordingly found that the claimant had borne the burden of the tax and not shifted it directly or indirectly. (Followed in *United States* v. *Root McBride Co.*, 136 F. 2d 907.)

The Seventh Circuit in the instant case, in holding that the comparative loss sustained by the petitioner in selling the taxed articles for less than the pre-tax value thereof does not establish the tax burden to have been borne, is in conflict with the above decision of the Sixth Circuit.

In *Interwoven Stocking Co.* v. *United States,* 144 F. 2d 768, 771, the Third Circuit held that where the selling prices of the taxed articles were increased to cover increased costs, but not sufficiently to also recover the floor tax, that the burden imposed by Sec. 902 of the Revenue Act of 1936 had been properly met by the claimant. The Seventh Circuit in the instant case, in holding that the petitioner's inability to recoup even the pre-tax value of the taxed articles, much less any price increase to recover the additional tax burden, does not establish the burden of the tax to have been borne, is in conflict with the above decision of the Third Circuit.

In *United States* v. *Arkwright Mills,* 139 F. 2d 454, the Fourth Circuit found that the claimant sold the taxed articles at market prices which declined after imposition of the tax and were not sufficient to recoup the pre-tax value of the taxed articles coupled with the additional tax burden thereon. The Fourth Circuit held that this evidence met the requirements of the statute and showed the claimant to have borne the burden of the tax. The Seventh Circuit in the instant case, in holding that petitioner shifted the tax burden despite inability to recover even the pre-tax market value of the taxed articles, is in conflict with the above decision of the Fourth Circuit.

In *C. B. Cones Mfg. Co.* v. *United States,* 123 F. 2d 530, this very same Seventh Circuit held that the basic evidence for determining the extent to which a floor tax was borne or shifted to vendees was a comparison of selling prices before and after imposition of the tax. In that case the

claimant's selling prices *had been increased* but the Seventh Circuit found that this increase should be offset by increased costs (replacement cost of inventory) before attributing any part of the price increase to a shift of the floor tax to vendees. The Seventh Circuit in the instant case, by holding that the petitioner need not be made "whole" (placed in the financial position available had the taxed articles been sold immediately before and without payment of the tax thereafter imposed) prior to any possible contention that the tax burden was shifted through increased prices to petitioner's vendees, is thus in conflict with its own earlier decision.

2. The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the foregoing decisions of the Sixth, Third and Fourth Circuits and with its own earlier decision, in holding that comparison of selling prices before and after imposition of the tax, disclosing that petitioner did not succeed in recovering even the pre-tax value of the taxed articles exclusive of the additional tax burden, does not establish that petitioner bore the burden of the tax, and in holding that petitioner had the "well-nigh insuperable" and impossible burden of showing all of the complex elements that might have entered into the market price of the taxed articles.

3. The decision of the Circuit Court of Appeals for the Seventh Circuit in the instant case is contrary to the decisions of this Court in *Galloway* v. *United States*, 319 U. S. 372; *United States* v. *Spaulding*, 293 U. S. 498, 506; *First National Bank* v. *Texas*, 26 Wall. 72, 22 L. Ed. 295, 296; and in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Franklyn Peanut Co.* v. *Commissioner*, 144 F. 2d 979. In each of these cases the court established the principle that facts directly established cannot be overcome or refuted by opinion evidence no matter how expert.

In the instant case the petitioner's selling values before and after the imposition of the tax were shown in exact amount for each of the taxed articles and disclosed the pre-tax value to be $910,421.28 and the amount actually realized after imposition of the tax to have been only $866,-226.84. By selling its taxed inventory at the prices available prior to imposition of the floor tax the petitioner could have realized $910,421.28 without liability for any tax thereon. The petitioner instead held these articles, paid a tax thereon of $82,135.28 and eventually sold the same for $866,226.84, a selling value decrease of $44,194.44 which, coupled with the additional burden of the tax, brings the total comparative loss to $126,329.72. The Seventh Circuit in the instant case, by permitting the consideration of opinion evidence to refute these definitely ascertained and tangible facts, is in conflict with the foregoing decisions of this Court.

4. The decision of the Circuit Court of Appeals for the Seventh Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Colonial Milling Co.* v. *Commissioner,* 132 F. 2d 505, in holding that an admission by defendant that the petitioner's taxed inventory had a market value of $910,-421.28 prior to the tax and was sold after the tax for $866,226.84 could be overcome by evidence of market prices covering only 40% of the 12,076,995 pounds of taxed articles. The Sixth Circuit held in the foregoing case that a partial disclosure of the material facts, limited to only part of the taxed articles, is not sufficient to establish the extent to which a tax burden is borne or shifted. In the case at bar, to the exact contrary, the Seventh Circuit permitted the respondent to introduce market quotations on only 40% of the 12,076,995 pounds of taxed articles and permitted the respondent's employee-witness to render

"expert" opinions founded on this small part of the taxed articles.

5. The decision of the Circuit Court of Appeals for the Seventh Circuit in the instant case conflicts with the decision of this Court in *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, where this Court held that the statute here involved, requiring the claimant to show he has not shifted the burden of the tax, should not be construed as demanding the performance of a task found to be inherently impossible as a condition to relief. The Seventh Circuit in the instant case concluded that the petitioner's inability to recover even the pre-tax value of the taxed inventory, much less succeeding in recouping the tax burden, was not sufficient evidence because:

> "* * * the burden of the presentation of a proper claim, and of evidence, sufficient to sustain it, is a well-nigh insuperable one. This may be a harsh burden, but we are governed by it." (R. 80; C. C. A. Op. p. 5.)

This is in direct conflict with the decision of this Court in the *Anniston* case.

6. The decision of the Circuit Court of Appeals for the Seventh Circuit in the instant case, in holding that Congress chose to use "margins" rather than the sales value which claimant proved to show whether the tax had been shifted, is contrary to the statute. (7 U. S. C. A. 649 (b) (1).) The section with respect to margins as evidence relied upon by the court in the instant case has no application whatsoever to "floor stock taxes" levied under Sec. 16 of the Agricultural Adjustment Act (7 U. S. C. A. 616) because by its express terms it is made applicable only to "processing taxes" and not to "floor stock taxes." The question involved in this case is one of Federal law, which has not been, but should be, settled by this Court.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

WILLIAM R. BROWN,
CHARLES J. CALDERINI,
W. ROBERT BROWN,
Attorneys for Petitioner.

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No. .....

BERNARD G. BRENNAN COMPANY,
AN ILLINOIS CORPORATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for writ of certiorari and are also set forth in the opinion below of the Seventh Circuit Court of Appeals.

JURISDICTION.

The basis of the jurisdiction of this Court is shown in the accompanying petition.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals, rendered by Judge Evans, is to be found at page 76 of the printed transcript of record filed herewith.

SPECIFICATION OF GROUNDS FOR GRANTING WRIT OF CERTIORARI.

Petitioner states that the opinion of the United States Circuit Court of Appeals for the Seventh Circuit conflicts with the decisions of this Court and of other circuits in the following respects:

1. In holding that a comparison of petitioner's sales prices before and after the tax is not sufficient evidence to establish the extent to which the burden of the floor tax was borne or shifted.

2. In holding that direct factual evidence of petitioner's actual selling prices can be overcome by opinions or published price statistics.

3. In holding that the evidence required to sustain the recovery of a floor tax is the same as that provided by statute with respect to processing taxes.

4. In holding that matter incapable of proof must first be established as a prerequisite to recovery of a floor stock tax.

ARGUMENT.

I.

The Writ of Certiorari Should Issue Because the Decision Conflicts with Decisions in Other Circuits in Holding that a Comparison of Petitioner's Sales Prices Before and After the Tax Is Not Sufficient Evidence to Establish the Extent to Which the Burden of the Floor Tax was Borne or Shifted.

The Circuit Court opinion sets forth the comparison of petitioner's actual selling prices for each of the taxed articles, which showed the total pre-tax value to have been $910,421.28 and that, after paying the floor tax thereon of $82,135.28, the petitioner sold these taxed articles for only $866,226.84, an amount $44,194.44 less than the sales value preceding the tax. (R. 77.) With reference to petitioner's inability to recover even the pre-tax value of its taxed inventory, much less any price increase sufficient to recoup the additional burden of the floor tax, the Circuit Court held as follows (R. 80):

> "But does that prove the taxpayer did not add the tax and pass it on to the consumer? We think not. * * * The burden of the presentation of a proper claim, and of evidence to sustain it, is a well-nigh insuperable one. This may be a harsh burden, but we are governed by it."

In so holding the Circuit Court opinion relied upon processing tax cases and the special statutory provisions and type of evidence specified for processing tax claims. (7 U. S. C. A. 649.)

With respect to floor stock taxes, the statute provides no specific formula for establishing the extent to which the

burden of a floor tax is borne or shifted. In successfully urging that the restrictive provisions of Title VII were valid (*Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 57 S. Ct. 816), the government suggested the type of evidence sufficient to establish the extent to which the burden of a floor tax is borne. This government formula is quoted with approval in *United States* v. *Arkwright Mills,* 139 F. 2d 454, 455 (C. C. A. 4), as follows:

> "In the Anniston case, *supra,* the government (brief, page 138, footnote 71) advanced this formula: 'Generally, a simple comparison of the sales prices before and after imposition of the tax should be sufficient. The taxes were imposed on goods held ready for sale, and change or lack of change in the price on these goods would ordinarily be conclusive as to tax shifting or absorption.'
>
> Counsel for the United States in the instant case admit the soundness of this formula."

It should be noted that counsel for the government in the instant case also conceded the applicability and soundness of this formula (R. 40), and sought to exclude the evidence of petitioner's exact selling prices because, in the face of such a comparison, the government's opinion evidence regarding such prices "might be immaterial." (R. 31.)

This logical formula, used in determining the extent to which the burden of a floor tax has been borne or shifted, has been followed by the Circuit Courts of Appeals for the Third, Fourth and Sixth Circuits: *Interwoven Stocking Co.* v. *United States,* 144 F. 2d 768 (C. C. A.—3); *United States* v. *Arkwright Mills,* 139 F. 2d 454; *United States* v. *Cheek,* 126 F. 2d 1 (C. C. A.—6). In the instant case, the Seventh Circuit completely ignored its prior decision in *C. B. Cones & Son Mfg. Co.* v. *United States,* 123 F. 2d 530 (C. C. A.—7), where, in reversing the District Court, it held that a recovery of floor stock taxes was allowable on the basis of

a comparison of prices before and after imposition of the tax. In each of these cases, including the *Cones* case, recovery was allowed even though the comparison showed the sales price to be in excess of the pre-tax value which excess was offset by increased expenses. In the instant case, the pre-tax value was in excess of the aggregate sales price obtained after imposition of the tax.

In no case, other than the case at bar, has specific evidence providing an exact comparison of actual selling prices before and after imposition of the tax been deemed insufficient to establish the extent to which the taxpayer bore or shifted the burden of a floor tax. The instant decision conflicts with those from other circuits and presents a question of federal law which has not been, but should be, settled by this Court.

II.

The Writ of Certiorari Should Issue Because the Decision Conflicts with the Decisions of this Court and of other Circuits in Holding that Direct Factual Evidence of Petitioner's Actual Selling Prices Can be Overcome by Opinions or Published Price Quotations and General Statistics.

As heretofore noted, the petitioner afforded the Commissioner of Internal Revenue opportunity to investigate the merits of the refund claim, and introduced in evidence upon the trial, an exact dollar and cent comparison of the sales prices actually received by the petitioner for each of the taxed articles before and after imposition of the tax. (R. 12-18; 77.) Despite this exact proof of these material facts, the defendant was permitted to introduce in evidence, over petitioner's objections, the opinions of one Murray T. Morgan, a Department of Agriculture employee, predicated upon three exhibits containing

price quotations or statistics for a limited number of hog products.

As to 60% of the articles to be found in the petitioner's taxed inventory, these exhibits contained no price quotations or statistics whatsoever. (R. 78.) As to even the remaining 40% of the articles involved herein, these price publications were limited to a single day following the tax without regard to what such quoted prices were during the rest of the five months period in which the goods were actually sold. (R. 79.) The government witness was permitted to give his opinion, over objection, that prices of pork products as a whole generally advanced after imposition of the tax (R. 79), although he later qualified this opinion by admitting that such general averages showed an actual decline from October to December, 1933. With respect to the particular articles on which petitioner paid floor tax, the witness made no effort to show that the prices for any of them were increased on the next day or at any other time following the imposition of the tax.

The Circuit Court of Appeals affirmed the trial court's admission into evidence of such generalized opinions and statistics, citing as authority therefor *Cudahy Packing Co.* v. *U. S.*, 152 F. 2d 831, (C. C. A.—7), a case in which the actual selling prices were not disclosed by the evidence and in which neither party even raised a question regarding the propriety of such generalized evidence. Supported entirely by such general opinions and published statistics, none of which was given tangible reference to even one of the specific articles on which petitioner paid the floor tax, the Circuit Court held as follows (R. 79):

> "We must accept the fact that plaintiff sold its products at market price. Also we must accept the fact the market price the day after the imposition of the tax was higher than theretofore by the amount of the tax. Presumably the market price continued

> to reflect said tax—notwithstanding the fact that the market price sank below the price at which it stood at the incipience of the tax, or before tax imposition."

In other circuits it has been held that evidence of prices limited to a part only of the taxed articles is not sufficient to show whether or not the burden of the tax has been borne or shifted. *Colonial Milling Co.* v. *Commissioner*, 132 F. 2d 505 (C. C. A.—6). It is a well settled principle, under the best evidence rule, that facts directly established cannot be overcome or refuted by opinion evidence. *Galloway* v. *United States*, 319 U. S. 372; *United States* v. *Spaulding*, 293 U. S. 498, 506; *First National Bank* v. *Texas*, 26 Wall. 72, 22 L. Ed. 295, 296. In other circuits this rule has been properly applied to preclude the use of opinion evidence to overcome specific facts regarding actual prices. In *Franklyn Peanut Co.* v. *Commissioner*, 144 F. 2d 979, 982 (C. C. A.—4), the court well stated this applicable rule as follows:

> "It has been repeatedly held that the opinion of an expert necessarily made upon, in part at least, surmise and conjectures will not stand against proof of an actual fact. (Citing cases.)"

In the case at bar the petitioner's actual selling prices before and after the tax were shown in exact amount for each of the taxed articles. The extent to which petitioner increased its prices, in selling these articles after imposition of the floor tax, was capable of definite ascertainment and was so ascertained. These specific facts cannot be overcome by opinions regarding generalized market prices and, in holding to the contrary, the instant decision conflicts with those of this Court and in other Circuits.

III.

The Writ of Certiorari Should Issue Because the Decision Conflicts With Decisions in Other Circuits in Holding That the Evidence Showing the Extent of a Floor Stock Tax Burden Borne Is the Same as That Provided by Statute With Respect to Processing Taxes.

After discussing the statutory formula, expressly designed for and confined to processing tax claims (7 U. S. C. A. 649), and cases involving this differing type of evidence material to processing taxes, the Circuit Court said as follows:

> "We think the Congress advisedly chose to use 'margins' (which we presume approximates the ordinary concept of 'profit') rather than the easily ascertained 'market' value, or sale value, which taxpayer sought to prove. * * * Taxpayer's reticence to take up the issue of lower profits before and after the tax, sufficient to encompass the tax, is important. The burden was on it to negative any possible basis for arguing the burden was shifted."

The logical rule of price comparison, applied to floor stock tax cases in the other circuits, is that the taxpayer must first recover at least the pre-tax value of the goods, together with any increased expenses, before he can be said to have also recovered any "profit" sufficient to "encompass the tax." (See point I hereinbefore.) Even the Seventh Circuit, prior to the instant decision, has held that a taxpayer must first be made whole before the burden of a floor tax can be found to have been shifted. *C. B. Cones Mfg. Co.* v. *United States*, 123 F. 2d 530 (C. C. A.—7). In no case involving floor stock taxes, other than the case at bar, has the taxpayer been required to establish the type of evidence which Congress expressly limited to processing tax refund claims. (7 U. S. C. A. 649.)

In holding to the contrary, the instant decision conflicts with those from other circuits. Writ of certiorari should issue by this Court to resolve this differing interpretation of the statute by deciding whether the evidence material to a floor stock claim is the same as that required for processing tax claims.

IV.

The Writ of Certiorari Should Issue Because the Decision Conflicts With the Decisions of This Court and of Other Circuits in Imposing Conditions Impossible of Performance as a Prerequisite to Any Recovery.

After discussing the type of evidence required to sustain recovery of processing taxes, the Circuit Court went on to hold (R. 80):

> "A second deduction fairly to be drawn from these decisions, is that the burden of the presentation of a proper claim, and of evidence sufficient to sustain it, is a well-nigh insuperable one. This may be a harsh burden, but we are governed by it."

And that (R. 82):

> "The burden was on it (petitioner) to negative any possible basis for arguing the burden was shifted."

In *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351, 81 L. Ed. 1143, this Court said:

> "When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled."

By failing to follow the logical rule of price comparison

adopted in other circuits, and by permitting specific factual evidence to be overcome by opinions founded on conjecture and surmise, the Circuit Court in the instant case has indeed imposed "a harsh burden" which "is a well-nigh insuperable one". In so doing the instant opinion conflicts with those of this Court and of other circuits and writ of certiorari should issue.

We respectfully submit that certiorari should be granted to the end that this Honorable Court may settle the questions involved.

Respectfully submitted,

WILLIAM R. BROWN,
CHARLES J. CALDERINI,
W. ROBERT BROWN,
Attorneys for Petitioner.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 659

BERNARD G. BRENNAN CO., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 76–82) is reported at 165 F. 2d 500. The findings of fact and conclusions of law of the District Court (R. 51–53) are reported at 63 F. Supp. 106.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 83) was entered on December 18, 1947. The petition for a writ of certiorari was filed on March 8, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer established, as required by Section 902 of the Revenue Act of 1936, that it bore the burden of the floor stock taxes which it seeks to recover.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Treasury Regulations involved are printed in the Appendix, *infra*, pp. 8–10.

STATEMENT

This is a suit against the United States under Title VII of the Revenue Act of 1936, c. 690, 49 Stat. 1648, Sections 901 to 916, inclusive, for refund of amounts paid as floor stock taxes under the Agricultural Adjustment Act, c. 25, 48 Stat. 31. The Commissioner denied the claim for refund on the ground that the taxpayer had not established that it had borne the burden of the tax as required by Section 902 of the 1936 Act. In its answer (R. 9) to the complaint filed in the District Court (R. 2–8), the United States denied substantially all of the allegations of the complaint, and as a further defense alleged that the plaintiff had failed to comply with the requirements of Section 903 of the Revenue Act of 1936, with respect to the filing of a claim for refund of the amount sued for.

The evidence in the case consists of a stipulation of facts (R. 19–22), an admission of facts

and of the genuineness of documents submitted by the taxpayer (R. 11, 12–18), and certain oral testimony (R. 27–49). The findings of the District Court (R. 51–52) based on this evidence are, briefly, that the petitioner, Bernard G. Brennan Company (herein sometimes referred to as the taxpayer), an Illinois corporation, is engaged in the business of meat packing, with its principal office and place of business at Chicago, Illinois. On January 29, 1934, and April 2, 1934, the taxpayer paid to the Collector of Internal Revenue the respective sums of $81,998.42 and $136.86 as floor stocks taxes on hogs and hog products under the Agricultural Adjustment Act. Of the total amount thus paid by the taxpayer, the Government refunded to it the sum of $2,194.86, and the taxpayer was reimbursed by its vendees to the extent of $3,565.60. (R. 51–52.)

On June 30, 1937, the taxpayer filed a claim for refund of $77,232.06 of these floor stocks taxes, alleging as a ground for refund that it had at all times sold its commodities at prevailing market prices.[1] On December 16, 1939, the taxpayer filed an amended claim for the refund of $77,232.06 which included, as evidence that the taxpayer had not shifted the burden of the tax, a comparison of the taxpayer's prices at the time of the imposition of the tax and its prices in the period

[1] See Exhibit A attached to the complaint but omitted from the printed record by agreement. (R. 69.)

during which the inventory upon which the tax had been assessed was sold.[2] (R. 52.)

At all times before and after the imposition of the floor stocks tax in question, the taxpayer sold its pork products at prevailing market prices. On November 5, 1933, the date of the imposition of the floor stocks tax, the market prices at which the taxpayer sold its products were increased by the amount of the tax. (R. 52.)

The District Court then found: "The plaintiff has failed to prove that it absorbed the burden of the floor stocks tax." (R. 52.) Further, it concluded as a matter of law that (R. 53):

> 1. The claim for refund does not comply with the provisions of section 903 of the Revenue Act of 1936 because it contains no evidence from which it can be determined whether or not the plaintiff shifted the economic burden of the tax.

The court below affirmed the decision of the District Court. (R. 83.) Its opinion contains no explicit reference to the jurisdictional problem, but does state that the court's prior decision in *Cudahy Packing Co.* v. *United States,* 152 F. 2d 831, certiorari denied, 328 U. S. 849, which rested on both the burden of proof and the jurisdictional ground, is controlling.

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[2] See Exhibit B attached to the complaint but omitted from the printed record by agreement. (R. 69.)

ARGUMENT

The Circuit Court of Appeals correctly decided that the District Court was right in dismissing the taxpayer's complaint for failure of proof. The burden was upon the taxpayer to establish to the satisfaction of the trial court that it had borne the burden of the tax which it sought to recover. Section 902 of the Revenue Act of 1936 (Appendix, *infra*, pp. 8–9); *Webre Steib Co.* v. *Commissioner*, 324 U. S. 164, 171. The trial court found that on the date of the imposition of the floor stock tax, the market prices at which the taxpayer sold its hog products were increased by the amount of the tax. (R. 52.) The Circuit Court of Appeals held that this finding was supported by the evidence (R. 82), and that the taxpayer had failed to prove that the subsequent reduction in price was other than a general and natural decline due in no wise to the alleged fact that "plaintiff lifted the amount of the tax from said commodities." Consequently, it sustained the District Court's finding (R. 52) that the taxpayer had failed to prove that it had absorbed the burden of the tax.

There is no merit to the taxpayer's assertion that this decision is in conflict with *United States* v. *Cheek*, 126 F. 2d 1 (C. C. A. 6th); *United States* v. *Root & McBride Co.*, 136 F. 2d 907 (C. C. A. 6th); *Interwoven Stocking Co.* v. *United States*, 144 F. 2d 768 (C. C. A. 3d); *United*

States v. *Arkwright Mills,* 139 F. 2d 454 (C. C. A. 4th); *Colonial Milling Co.* v. *Commissioner,* 132 F. 2d 505 (C. C. A. 6th), certiorari denied, 318 U. S. 780, or with the lower court's own earlier decision in *C. B. Cones & Son Mfg. Co.* v. *United States,* 123 F. 2d 530. As the court below pointed out (R. 79), the question of whether or not the tax involved was shifted is a question of fact. It must be determined in each case on the basis of the evidence submitted. In each of the above cases, with the exception of *C. B. Cones & Son Mfg. Co.* v. *United States, supra,* the appellate court merely held that the evidence was sufficient to support the finding of the trial court. The *C. B. Cones* case, which is of doubtful correctness, was decided by the court below and cannot be considered a conflict. In any event, it is plainly distinguishable on its facts.

Nor is there any merit to the taxpayer's assertion that the decision below is contrary to the decisions of this Court in *Galloway* v. *United States,* 319 U. S. 372; *United States* v. *Spaulding,* 293 U. S. 498; *National Bank of Washington* v. *Texas,* 20 Wall. 72, or that it is in conflict with *Franklin Peanut Co.* v. *Commissioner,* 144 F. 2d 979 (C. C. A. 4th), certiorari denied, 324 U. S. 867. The assertion is based upon the assumption that here the court below permitted the consideration of opinion evidence to refute definitely ascertained and tangible facts. But since the taxpayer's evidence failed to sustain its contention that the price de-

cline was attributable to its assumption of the tax, it in no way contradicted the Government's opinion evidence; thus the cases cited by the taxpayer are not apropos.

The taxpayer has cited no decision, and we know of none, which holds that the evidence relied upon by it requires a finding that it bore the burden of the tax, even in the absence of the rebuttal evidence introduced in this case.

Finally, the decision below is not in conflict with, but on the contrary is in accord with, the decision of this Court in *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. Lack of available evidence may create a hardship in a particular case, but it does not relieve the taxpayer of his burden of proof. *Burnet* v. *Houston,* 283 U. S. 223, 228.

CONCLUSION

The decision below is correct. It is supported by the facts and the law and is not in conflict with any other decision. The petition for a writ of certiorari should bedenied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
SEWALL KEY,
A. F. PRESCOTT,
FRED E. YOUNGMAN,
Special Assistants to the Attorney General.

APRIL 1948.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed

therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(7 U. S. C. 1940 ed., Sec. 644.)

SEC. 903 [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862]. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

(7 U. S. C. 1940 ed., Sec. 645.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

> ART. 202. FACTS AND EVIDENCE IN SUPPORT OF CLAIM.—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.
>
> The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

U. S. GOVERNMENT PRINTING OFFICE: 1948